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Supreme Court, U.S.
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No. 95- _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TALAL H. ALZANKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the safeguards set forth in this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), for admission of evidence under Federal Rule of Evidence 702 apply to expert psychological testimony.

2. Whether a district court's decision to admit evidence under Federal Rule of Evidence 702 is subject to de novo review in the court of appeals or simply review for abuse of discretion.

3. Whether a threat of deportation to a friendly country can satisfy the physical or legal coercion requirement of the involuntary servitude statute, 18 U.S.C. § 1584.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Talal H. Alzanki and respondent United States of America.

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Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994) 13

Developments, *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481 (1995) 10, 11, 13

David L. Faigman, Elise Porter and Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Furture of Scientific Evidence*, 15 Cardozo L. Rev. 1799 (1994) 14

Paul Giannelli, *Junk Science: The Criminal Cases*, 84 J. Crim. L. & Criminology 105 (1993) 13

David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 Oregon L. Rev. 19 (1987) 12

Andrea Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 2 (1993) 13

John Monahan and Lauren Walker, *Judicial Use of Social Science Research After Daubert*, 2 Shepard's Expert and Scientific Evidence Q. 327 (1994) 12

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Diana K. Sheiness, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 Wash. L. Rev. 481 (1994) 10
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Talal H. Alzanki respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 54 F.3d 994 and reprinted at pages 1a-24a of the appendix to this petition.

JURISDICTION

The Court of Appeals for the First Circuit entered its judgment on June 1, 1995. On August 21, 1995, on application of petitioner, Justice Souter extended the time in which to file the petition for writ of certiorari to and including October 16, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 702, Federal Rules of Evidence, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert of knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

18 U.S.C. § 1584 (1988 & Supp. VI) provides:

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1988 & Supp. VI) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case grew out of a conviction for violation of 18 U.S.C. § 1584, the involuntary servitude statute. The "coercion" found to satisfy the statute was threats of deportation to a friendly country. In an effort to explain why these threats constituted coercion, the government introduced, over petitioner's objection, the testimony of a nurse, who was described as a "victimologist," who testified that the "special vulnerabilities" of the complainant in this case prevented her from leaving even though there was no physical restraint. The case then presents three important questions: *first*, whether the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), apply to psychological testimony proffered by an expert; *second*, whether

appellate review of a district court's determinations about expert testimony is *de novo* or simply for abuse of discretion; and *third*, whether the threat of deportation satisfies the physical or legal coercion requirement under 18 U.S.C. § 1584.

1. Background

Petitioner Talal Alzanki and his wife Abair, both citizens of Kuwait, came to the United States in January 1992 so that Mr. Alzanki could pursue a degree in electrical engineering at Boston University. At the time, Mrs. Alzanki was pregnant and due to give birth in August 1992. (Tr. at 9-55.)[1] They rented a two bedroom apartment in Quincy, Massachusetts, and Mrs. Alzanki began studying English at a nearby college. (Tr. at 7-57.)

On May 14, 1992, three months prior to her due date, Mrs. Alzanki gave birth to a severely handicapped baby, who was named Yousef. Due to his birth defects, which include spina bifida, Yousef remained hospitalized for more than five months until November 28, 1992. (Tr. at 7-59, 4-16.) Upon his discharge, Yousef required intensive in-home nursing treatment. (Tr. at 9-111 to 9-112.) To care for Yousef's special needs and to train the Alzankis to care for him, nursing care was provided. Initially, the nursing care was provided round-the-clock. After two weeks, the nurses spent less time at the Alzankis, and the Alzankis provided the necessary care.

Prior to Yousef's release from the hospital, Mr. Alzanki's mother, who lived in Kuwait, hired Vasantha Gedara, a native of Sri Lanka, then residing in Kuwait, to live with the Alzankis and assist them in the care of Yousef and with household duties. App. 1-2a. Ms. Gedara, who was then twenty-four years old, had moved to Kuwait in 1991 in order to obtain employment as a domestic worker. (Tr. at 3-117.) She returned to Sri Lanka four months later, after the outbreak of the Gulf War, but in

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[1] Citations to "Tr." refer to the transcript of the trial conducted before the district court.

March 1992 she again moved to Kuwait in order to obtain employment. During her time in Kuwait, Ms. Gedara worked as a housekeeper for several different families.

Ms. Gedara, who spoke English well, had been trying to come to the United States for some time. (Tr. at 4-58.) After she was hired by Mr. Alzanki's mother, Ms. Gedara flew to the United States on August 27, 1992 with all expenses paid by Mr. Alzanki and his family. (Tr. 3-141, 4-67.) As the court below described, relating the facts of this case "in the light most favorable to the verdicts," App. 1a at n.1, Mr. Alzanki took Ms. Gedara's passport upon her arrival from Kuwait and told her not to leave the apartment alone.[2] The government claimed she was "imprisoned" for a four-month period from the time she began her employment in August until she left in December.

From the time of Ms. Gedara's arrival in August until the end of November, Ms. Gedara's responsibilities were limited, as Yousef remained in the hospital. She frequently accompanied the Alzankis to visit Yousef in the hospital and, along with the Alzankis, began to learn about some aspects of his care. She also accompanied the Alzankis on shopping trips and visits with their friends. However, as she testified at trial, from the time she began working for the Alzankis through late November of that year when Yousef came home from the hospital, Ms. Gedara frequently was alone in the unlocked apartment. During the entire period of her employment, as the court below described, Ms. Gedara "often ventured outside [the Alzankis'] *unlocked* apartment . . . ." App. 15a (emphasis in original).

The court below detailed working conditions at the Alzankis: according to Ms. Gedara's testimony at trial, she was not permitted to use the telephone or mail, speak to persons other than the Alzankis, go out onto the balcony of the apartment or look out of the apartment windows. In addition, testimony was

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[2] Mr. Alzanki explained at trial that he placed Ms. Gedara's passport in a bank safe deposit box for safe keeping along with his and his wife's passports. (Tr. at 9-73, 9-74.)

elicited at trial that Ms. Gedara was denied adequate food. App. 2a. Ms. Gedara also testified that she was required to repeatedly clean the apartment, and that she did not receive adequate medical treatment. App. 2a, 13a. Ms. Gedara testified that she was assaulted on two separate occasions. App. 2a, 13a. She alleged that Mr. Alzanki kicked her pillow and grabbed her arm and threw her against the wall when she asked him to turn off the television. App. 13a. On a separate occasion, Mrs. Alzanki slapped Ms. Gedara when she did not turn off the hospital baby monitor. App. 2a. In addition, Ms. Gedara testified that Mr. Alzanki said that if anything were to happen to their son while they were away, he would kill Ms. Gedara. App. 3a.[3]

There was no testimony that Ms. Gedara was threatened with physical harm if she were to leave the Alzankis' employ. However, there was testimony at trial that the Alzankis threatened to deport Ms. Gedara to Kuwait, and testimony as well that domestic servants are not treated well in Kuwait. App. 14a at n.10.

According to testimony at trial, Ms. Gedara complained about her job to the nurses caring for Yousef. App. 3a, 21a. On December 17, 1992, some three weeks after Yousef came home from the hospital, Ms. Gedara left the Alzanki's apartment with the local police. App. 3a. She never returned to the Alzanki's apartment.

2. The Proceedings Below

Thereafter, a federal grand jury returned a two count indictment against Mr. and Mrs. Alzanki. App. 3a. The indictment charged the defendants with involuntary servitude and conspiracy to commit involuntary servitude in violation of 18 U.S.C. §§ 371 and 1584. *Id.* Both Mr. and Mrs. Alzanki entered pleas of not

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[3] Ms. Gedara also testified that she witnessed on one occasion Mr. Alzanki hitting his wife, and was later told by Mrs. Alzanki that Mr. Alzanki had struck her again shortly thereafter. App. 3a.

guilty. After trial commenced, a mistrial was entered as to Mrs. Alzanki, and the Government dismissed the indictment as to her, due to the birth during trial of her second child. *Id.*

Because a conviction under 18 U.S.C. § 1584 requires a finding of "physical or legal coercion," *United States v. Kozminski*, 487 U.S. 931, 948 (1988), during the trial, the Government presented evidence that Mr. Alzanki had threatened to have Ms. Gedara deported to Kuwait, a friendly country. App. 3a, 14a. Given Ms. Gedara's visa status, deportation to Kuwait would be the natural result of ceasing employment for the Alzankis.

The government offered the testimony of a nurse, Ann Burgess, a self-proclaimed "victimologist," App. 15a, to discuss "special vulnerabilities" that might have kept Ms. Gedara from leaving.[4] Ms. Burgess claimed training that "related to victims of sexual abuse," and claimed to have looked into non-sexual abuse of battered spouses and children, persons she viewed as having "unequal power relationships." App. 17a (internal quotations omitted). Ms. Burgess testified that she had never worked with "a single actual or alleged victim of involuntary servitude or slavery." (Tr. 5-73.) She had not worked with hostages of war, holocaust survivors, migrant workers who have been enslaved, or any other situation similar to that presented here. Her experience and research focused primarily on victims of rape, marital abuse, sexual assault, sexual kidnapping, incest and child sexual abuse.

Mr. Alzanki, first in a motion *in limine* and again at trial, objected to this testimony, arguing that it was not admissible under the standards announced in *Daubert*. Although the government had originally argued that the testimony was scientific and therefore within the scope of *Daubert*, at trial it urged that *Daubert* did not apply because *Daubert* "requires scientific knowledge." (Tr. 5-83). According to the government,

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[4] On January 25, 1994, petitioner moved *in limine* to exclude the testimony of Ms. Burgess. The court denied Petitioner's motion on February 15, 1994.

Ms. Burgess' testimony was instead based on specialized knowledge, training, and expertise . . . ." (Tr. 5-83). The court permitted Ms. Burgess to testify that Ms. Gedara's failure to leave was "*consistent with the behavior of abuse victims generally*" who do not leave abusive situations. App. 17a (emphasis in original).

Mr. Alzanki was convicted of a violation of 18 U.S.C. § 1584 and § 371, and sentenced to a prison term of one year and one day. The court also ordered Mr. Alzanki to make restitution in the amount of $13,403.00.

On appeal, the First Circuit upheld the conviction. The court held that the testimony of Ms. Burgess was properly admitted to show the special vulnerabilities of Ms. Gedara and did not need to be tested against the standards set forth in *Daubert*. App. 16-18a. The court also held that its review of the district court's decision to admit the testimony was not *de novo* but was simply for abuse of discretion. Addressing the sufficiency of the evidence, the court of appeals recognized that physical or legal coercion is an essential element of a violation of 18 U.S.C. § 1584, but held that the coercion element was satisfied by threats of deportation.[5]

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICATION OF THE *DAUBERT* STANDARD.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2798 (1993), recognizing that "[e]xpert evidence can be both powerful and quite misleading," this Court set forth a detailed standard for the admission of expert testimony based on

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[5] In the court below, petitioner raised other challenges to his conviction which are not involved in this petition for writ of certiorari.

scientific knowledge. Thus, under Federal Rule of Evidence 702, courts are required to determine whether the expert testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 2796. The test "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* Factors to be considered include whether the knowledge can be or has been tested, whether it can or has been subjected to peer review or publication, what the potential error rate is, and whether it has been generally accepted. *Id.* at 2795-2797.

This standard seeks to guarantee the validity and reliability of expert testimony prior to its admission in order to protect the integrity of the trial. *See id.* at 2797. However, in *Daubert*, this Court did not decide whether its holding extended to all expert testimony under Fed. R. Evid. 702, *i.e.*, to "technical, or other specialized knowledge" as well. *See id.* at 2795 n.8. Indeed, Chief Justice Rehnquist, concurring in part and dissenting in part, questioned: "[d]oes all this *dicta* apply to an expert seeking to testify on the basis of 'technical or other specialized knowledge' — the other types of expert knowledge to which Rule 702 applies — or are the 'general observations' [as suggested by the *Daubert* majority] limited only to 'scientific knowledge?'" *Id.* at 2800.

Since the decision in *Daubert*, conflicts have arisen among the circuits precisely on this question. The decision below conflicts with the decisions of other courts of appeals, both as to whether *Daubert* governs the admissibility of technical or specialized but non-scientific expert testimony under Rule 702, and, in particular, whether the standards of *Daubert* should apply to expert psychological testimony.

A. There is a Conflict Among the Circuits About Whether Daubert Applies to Specialized or Other Non-Scientific Knowledge.

The First Circuit treated the testimony of Ann Burgess, the so-called "victimologist," not as scientific knowledge but as "other specialized knowledge" under Rule 702. App.16-17a. Accord-

ingly, the First Circuit looked solely to whether the expert's opinion would assist the trier of fact, but did not test the reliability or validity of the opinions she expressed, nor the underlying basis or knowledge for those opinions, as would have been required for scientific knowledge under *Daubert*. App. 16-17a; *Daubert*, 113 S.Ct. at 2796-7.

This decision is therefore directly in conflict with decisions of other courts of appeals that have applied this Court's decision in *Daubert* to "other specialized knowledge." For example, in *Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995), a case involving testimony over police department disciplinary procedures, the court acknowledged that *Daubert*, by its terms, applies only to scientific evidence. Nonetheless, because "evidentiary problems are exacerbated when courts must deal with the even more elusive concept of non-scientific expert testimony," the Sixth Circuit applied the standard and factors from *Daubert* to the non-scientific expert there. *Id.* at 1349.

Other courts of appeals have taken the same approach as the Sixth Circuit, applying the *Daubert* standard to non-scientific expert testimony. Thus, for example, in *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit applied *Daubert* to an expert testifying about the reliability of eyewitness testimony. Likewise, the Tenth Circuit utilized the *Daubert* analysis to reach "technical and other specialized knowledge" with respect to a fire chief's testimony about the cause of a fire, *see United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993), and to technical evidence concerning a train crash. *See Robinson v. Missouri Pacific R.R.*, 16 F.3d 1083 (10th Cir. 1994).

Other circuits, like the First Circuit in the present case, have rejected the use of the *Daubert* factors outside the scientific context. Thus, in *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994), the Second Circuit held that *Daubert* was intended to prevent the use of "junk science," and thus did not apply to other sorts of experts, including the

construction litigation at issue there. The Second Circuit also declined to apply *Daubert* to expert testimony by an FBI agent about organized crime. *See United States v. Locascio*, 6 F.3d 924, 937-8 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1646 (1994). Likewise, in *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1270 (9th Cir. 1994), the Ninth Circuit held that *Daubert* applies only to cases of scientific knowledge, not other specialized knowledge such as a longshore worker testifying about the working conditions of experienced longshore personnel.

Commentators too have recognized difficulties and confusion resulting from the issue left unresolved in *Daubert*, and have urged the Court to "develop general criteria for determining whether the evidence is reliable for the particular purpose for which it is offered." *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L.R. 1481, 1526-7 (1995); *see* Diana K. Sheiness, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 Wash. L. Rev. 481, 492 (1994). Rigorous review of the validity and reliability of expert evidence relying on specialized knowledge would protect, as *Daubert* was intended to do, against the admission of "junk" testimony and other expert evidence that is baseless, untestable, not subject to peer review, and not generally accepted in the relevant field.[6]

This Court should resolve the pervasive conflict among the courts of appeals regarding the applicability of the *Daubert*

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[6] As one commentator has noted:

> The least confusing and arbitrary way to deal with the classification issue would be to apply the same general standards of reliability and relevance to all types of expert testimony. There is no reason for an arbitrary classification to govern whether evidence relied on by the jury should be held to a lower standard of trustworthiness.

Confronting the New Challenges of Scientific Evidence, 108 Harv. L. Rev. 1481, 1527 (1995).

standard of review to expert testimony relying on specialized or non-scientific knowledge.

B. Clarification of When *Daubert* Applies is Particularly Important for the Type of Testimony Presented By the "Victimologist" in This Case.

Resolution of the issue of the lower federal courts' confusion over the applicability of *Daubert* to non-scientific or specialized knowledge is particularly important in cases such as this one where the expert testimony is rooted in psychology.

In addition to the general conflict about the application of *Daubert* to nonscientific testimony, there is also a specific conflict with respect to its application to psychological testimony. In *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1844 (1994), for example, the Seventh Circuit applied *Daubert* to a pathologist who sought qualification as an expert regarding the effects of torture and held that his testimony was not admissible. Although he had studied the subject, including interviewing numerous victims, the court found that he "failed to show that he has the requisite medical or scientific knowledge to establish the effects of electroshock treatments on the human body or psyche. All he was in a position to attest was that [the victim's] description of the effects of electroshock was consistent with that given by other electroshock victims with whom [the expert] has talked — testimony that would not even draw on [his] medical expertise." *Id.* at 1239.

Other courts of appeals have, like the Seventh Circuit in *Wilson*, applied *Daubert*'s standards to psychological testimony and other types of "soft" science. *E.g.*, *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir.), *cert. denied*, 115 S. Ct. 605 (1994) (psychological testimony regarding the reliability of eyewitness identification).

Commentators have recognized the importance of determining whether *Daubert* should apply to such testimony. *See*, *e.g.*, *Confronting the New Challenges of Scientific Evidence*, 108 Harv.

L. Rev. at 1526 ("It is unclear whether psychology should be classified as 'scientific' or as 'other specialized knowledge'") (footnote omitted); David O. Stewart, *A New Test*, 79 ABA Journal 48, 51 (November 1993) ("Indeed, will the *Daubert* analysis spill over from scientific experts to those offering expert opinion based on 'technical, or other specialized knowledge' under Rule 702? If so, *Daubert* could transform contests over the admissibility of expert psychological testimony on such subjects as rape trauma syndrome, post-traumatic stress disorder or the hazards of eyewitness identifications"); Lisa Askowitz and Michael Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027, 2097 (1994) ("'Scientific' evidence contemplated by the Court in *Daubert* is an explanative theory incorporating a process capable of being tested to produce error rates. Because this kind of testing is impossible in the field of child sexual abuse, *Daubert* does not control the admissibility of expert psychological testimony offered in child sexual abuse prosecutions").

This issue is an important one because of the wide extent to which this kind of psychology-based testimony is being used in courtrooms. In fact, social science research "is now almost always introduced as if it were simply an adjudicative fact - by expert testimony before a jury or judicial factfinder." John Monahan and Lauren Walker, *Judicial Use of Social Science Research after Daubert*, 2 Shepard's Expert and Scientific Evidence Q. 327, 339 (1994). As another commentator has observed, "[d]uring the last decade . . . a flood of nontraditional psychological evidence has inundated the courts in criminal cases. Several of these types of evidence are known as 'syndromes.' Examples include rape trauma syndrome, battered women (or wife) syndrome, and pathological gamblers' syndrome. . . . Other types of evidence are not denominated either 'syndrome' or 'profile' but are nonetheless nontraditional. Examples include diminished capacity, the psychology of child sexual abuse, the fallibility of eyewitness identification, psychological testimony regarding witness credibility, and other miscellaneous types of testimony." David McCord, *Syndromes, Profiles and Other*

Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases, 66 Oregon L. Rev. 19, 24 (1987).

Guidance from this Court is essential to ensure that courts apply uniform standards to this area. Such clarification is particularly important in criminal cases where the issue arises with considerable frequency. *Daubert* addressed the issue of expert evidence in a civil context; this Court has yet to clarify the proper standard for reviewing expert testimony in the context of criminal litigation. *See Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. at 1529. Because of the unique factors present in criminal litigation -- the usual lack of defense resources to hire experts, the higher stakes involved, and the limited discovery rights of defendants relative to civil litigation -- stricter requirements for the rigorous testing of the validity and reliability of expert testimony are essential. *See id.*; Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1352-4 (1994); Paul Giannelli, *"Junk Science": The Criminal Cases*, 84 J. Crim. L. & Criminology 105, 116 (1993); Andrea Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 2, 4 (1993).

II. IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

In addition to refusing to apply *Daubert*, the court below reviewed the district court's determination to permit Ms. Burgess to testify under an "abuse of discretion" standard rather than *de novo*. App. 16a. In deferring to the district court's discretion with respect to the decision to permit Ms. Burgess to testify, the First Circuit's decision raises a critical question concerning the proper standard of review. While some other circuits reviewing cases under *Daubert* have also used the deferential standard

adopted by the First Circuit, *e.g.*, *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995); *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993), the First Circuit's resolution of this issue is in sharp conflict with decisions of the Third, Seventh, and Ninth Circuits, which have held that such decisions must be reviewed *de novo*.[7] In *Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994), while upholding the district court's exclusion of expert testimony, the court stated that "[w]e first undertake a *de novo* review of whether the district court properly followed the framework set forth in *Daubert*." Likewise, in *Claar v. Burlington Northern R.R.*, 29 F.3d 499, 500 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit held that "[w]e review *de novo* the district court's interpretation of the Federal Rules of Evidence and will uphold its decision to exclude expert testimony unless it is 'manifestly erroneous.'" (citation omitted).

In *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3rd Cir. 1994), *cert. denied subnom. General Electric Co. v. Ingram*, 115 S. Ct. 1253 (1995), the Court of Appeals for the Third Circuit explained that the high level of deference to which evidentiary rulings are generally subject is not appropriate where expert testimony is concerned. Although the trial court has a superior vantage point to assess the evidence, evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses and thus is often not significantly more difficult for the Court of Appeals.

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[7] Significantly, under the old general acceptance test in *Frye v. United States*, 293 F. 1013 (1923), most courts reviewed the admission of expert evidence under a *de novo* standard because the determination of admissibility under *Frye* was deemed to be a question of law, not one of fact. *See* David L. Faigman, Elise Porter and Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1821 (1994).

The proper standard of review for the admissibility of expert testimony arises frequently and the Circuits are widely divided. This issue also warrants this Court's review.

III. THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT

In *United States v. Kozminski*, 487 U.S. 931, 939 (1988), this Court held that 18 U.S.C. § 1584 is violated only if there is a compulsion of services "by the use or threatened use of physical or legal coercion," and that "psychological coercion" is not enough. *Id.* at 948-49.

Here, since Ms. Gedara was not physically prevented from leaving the Alzankis' unlocked apartment, the First Circuit found the requisite physical or legal coercion solely in the threats of deportation to a friendly country made by Mr. Alzanki because App. 13-15a. The requirements were satisfied because Ms. Gedara "reasonably considered" deportation to Kuwait as "at least as severe as imprisonment, particularly when viewed in light of her 'special vulnerabilities.'" App. 14a. This conclusion is directly in conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Shackney*, 333 F.2d 475, 479 (2d Cir. 1964), where threats of deportation to another friendly country — Mexico — were found *not* to violate the statute.

In *Shackney*, the Second Circuit expressly rejected the claim that "because the statute can be satisfied by a credible threat of imprisonment, it should also be considered satisfied by a threat to have the employee sent back to the country of his origin, at least absent circumstances which would make such deportation equivalent to imprisonment or worse." 333 F.2d at 486.

This is because involuntary servitude does not exist "where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad." *Id.* at 486.

See United States v. Harris, 701 F.2d 1095, 1100 (4th Cir.) (reminder by the employer that the consequences of leaving will be exceedingly bad, *e.g.* deportation, is not enough), *cert. denied*, 463 U.S. 1214 (1983). "While a credible threat of deportation may come close to the line, it still leaves the employee with a choice." *Shackney*, 333 F.2d at 486.[8]

In *Kozminski*, this Court created additional confusion as to when a threat of deportation can constitute legal coercion. It cited

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[8] Most convictions under the statute prohibiting a holding to involuntary servitude involve extreme physical coercion, consistent with the purpose of the precursor to 18 U.S.C. § 1584, which was "enacted [by Congress] pursuant to its constitutional authority to enforce the Thirteenth Amendment . . . ." *Kozminski*, 487 U.S. at 945. *See e.g.*, *United States v. King*, 840 F.2d 1276, 1280 (6th Cir. 1988) (violation of 18 U.S.C. § 1584 where religious sect repeatedly threatened and used physical force to coerce children to perform labor), *cert. denied*, *subnom. Lewis v. United States*, 488 U.S. 894 (1988); *United States v. Booker*, 655 F.2d 562, 563 (4th Cir. 1981) (violation of 18 U.S.C. § 1584 where owners of migrant farm used physical force to coerce labor and kidnapped workers when they attempted to leave); *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966) (violation of 18 U.S.C. § 1584 where patients in a mental institution were forced to perform labor); *Downs v. Department of Public Welfare*, 368 F. Supp. 454, 465 (E.D. Pa. 1973); *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 156-7 (E.D. Pa. 1977). "Legal coercion" sufficient for a conviction under 18 U.S.C. § 1584 has been found only in *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (where Court held that peonage constituted involuntary servitude); *United States v. Reynolds*, 235 U.S. 133, 146 (1914) (Court found criminal surety system constituted involuntary servitude where misdemeanant contracted to work in exchange for surety's promise to pay the owed fine and misdemeanant was subject to criminal penalties if he failed to fulfil the contract); *Pollock v. Williams*, 322 U.S. 4, 5 (1944) (Court held that subjecting debtors to criminal punishment for failing to perform services constituted involuntary servitude); *Bailey v. Alabama*, 219 U.S. 219 (1911) (where Court invalidated a criminal penalty for laborers who breached their employment contracts).

Shackney with approval, but stated in dicta that "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude." 487 U.S. 948. At the same time, this Court also stated that, in enacting 18 U.S.C. § 1584, "far from broadening the definition of involuntary servitude for immigrants, children, or mental incompetents," Congress "eliminated any special distinction among, or protection of, special classes of victims." *Id.*

This case thus raises important questions as to whether the threat of deportation alone can satisfy the compulsion requirement of *Kozminski*. It is incredible to believe that Congress believed that a threat to terminate employment resulting in deportation to a friendly country such as Kuwait or Mexico constitutes coercion within the meaning of the statute. This is particularly true where, as here, the threatened deportation in any event would be the natural result of ceasing employment. Given the large number of foreign nationals who are subject to deportation if they leave their employment in the United States, this case presents important and recurring questions concerning the scope of the involuntary servitude statute.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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